THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2016-001604
Circuit Court Case No. 2015-CP-13-00379

Town of McBee ..... Appellant,

v.

Alligator Rural Water & Sewer Company, Inc., Alligator Rural Water Company, Inc. ..... Defendants,

and

A.O. Smith Corporation ..... Intervenor-Defendant,

of whom

Alligator Rural Water & Sewer Company, Inc. and Alligator Rural Water Company, Inc. are the ..... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

Alligator's attempt to frame itself as a responsible servant of the public interest that is somehow being wronged by the Town of McBee is understandable, but not factually accurate. As demonstrated by the thorough financial analysis provided by the accounting firm of Sheheen, Hancock and Goodwin, LLP, and as detailed in Mayor Campolong's affidavit to which it is attached, Alligator is essentially a quasi-public shell company that has been operating in a financially reckless way for years while paying hundreds of thousands of dollars a year to a for-profit "contractor" that is owned and controlled by Glenn Odom—himself a former mayor of McBee. The record shows that Mr. Odom orchestrated the current situation during periods of time when he and two of Alligator's employees were elected Town officials. (*See, e.g.*, R. pp. 192–95; Campolong Aff. ¶¶ 5–8, 16–23 (explaining the history of Alligator selling water to the Town).) According to the Town's 1999 Water Quality Report, there was no violation of drinking water standards in the Town's well water at the time Alligator began using the Town's system. (R. pp. 3, 203–06; Campolong Aff. ¶12 and Exhibit B.) In fact, those wells continued to supply most of the Town's water from 1999 through 2009, which is after Alligator took over control of the system. (R. p. 194; Campolong Aff. ¶ 14.)

Alligator's attempt to wrap itself in the mantle of a governmental entity entitled to the legal privileges afforded to the State of South Carolina should be considered in light of these facts. They show the reasonableness of the Town's desire to take back control of its water system.

Nor should the Court credit the legal arguments in Alligator's return brief that 7 U.S.C. § 1926(b) prevents the Town of McBee from turning on its wells and using its own water supply. The clear precedent interpreting that statute is precisely to the contrary. Nowhere in Alligator's brief does it identify a single authority—no statute, no case, and no regulation—that supports the

circuit court's orders enjoining the Town under Section 1929(b) from turning on its wells and supplying its own water. Instead, the case law is clear that Section 1926(b) ***does not*** prohibit the Town's conduct here.

Finally, the dispositive case law clearly establishes that a contract without any terms indicating exclusivity does not constitute an all-requirements contract, as Alligator would argue. Alligator's contract with the Town does not preclude the Town from displacing all or part of its requirements for water with its own supplies. Each of these defects is addressed below in turn.

ARGUMENT AND AUTHORITIES

I. The circuit court committed errors of law when issuing its injunction orders.

A. 7 U.S.C. § 1926(b) does not prevent the Town of McBee from operating its own wells, and neither the circuit court nor Alligator has identified any authority to the contrary.

The core inquiry for this appeal is whether the Town of McBee may use its own wells to serve its own water system without violating 7 U.S.C. § 1926(b). This statute prohibits a municipality or other public body from encroaching on or curtailing the area serviced by a rural water association that is also a federal-loan recipient "during the term of such loan." *Id.* It does not apply here.

Alligator claims that by turning on its own wells, the Town would "encroach" on Alligator's service area. (Return Br. at 13–14.) But Alligator does not cite a single case in support of this expansive construction of Section 1926(b). There is none. The existing precedent says the opposite.

In its brief, Alligator cites a number of 7 U.S.C. § 1926(b) cases, but none of them are relevant to this case. Most of them reflect the standard scenario of a municipality attempting to expand into an area served by a federally-indebted rural water association to take future customers. Others address whether a municipality has improperly encroached on a water

association's service area using such powers as condemnation, annexation, or an administrative rulemaking process to displace or constrain service by the association. None of these cases touch on the situation where a wholesale customer seeks to supply all or part of its own water from its own sources rather than buying water from the association:

Summary of Cases Cited in Alligator's Return Brief

Case	Context of § 1926(b) Analysis
N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir. 1996).	Dispute between municipality and water supply company about whether new subdivisions were within territory already served by company
City of Madison v. Bear Creek Water Ass'n, 816 F.2d 1057 (5th Cir. 1987).	Whether a city violated § 1926(b) by condemning part of a water supply company's facilities and claiming them as the city's own via eminent domain
Rural Water Dist. No. 5 Wagoner County v. City of Coweta, Case No. 08-CV-252-JED-FHM, 2016 U.S. Dist. LEXIS 107562 (N.D. Okla. Aug. 15, 2016).	Dispute between municipality and rural water district about whether four new customers were within territory already served by water district
Rural Water, Sewer & Solid Waste Mgmt. Dist. No. 1 v. City of Guthrie, Case No. CIV-05-786-M, 2016 U.S. Dist. LEXIS 2895 (W.D. Okla. Jan. 11, 2016).	Dispute between municipality and rural water district about which entity could rightly serve numerous disputed customers
Miss. Rural Water Ass'n v. Miss. PSC, Case No. 3:14-cv-848 DPJ, FKB, 2014 WL 12540566 (S.D. Miss. Dec. 9, 2014).	Whether a state agency rule exempting victims of domestic violence from providing security deposits for public utilities' service violated § 1926(b)
Adams County Water Ass'n v. City of Natchez, Case No. 5:10CV199-DCB-RHW, 2013 U.S. Dist. LEXIS 99059 (S.D. Miss. July 16, 2013).	Whether, as a matter of state law, a rural water association "made services available" to a disputed area for purposes of § 1926(b) simply by having a certificate authorizing it to do so
Rural Water Dist. No. 4 v. City of Eudora, Case No. 07-2463-JAR, 2009 U.S. Dist. LEXIS 79724 (D. Kan. Sept. 2, 2009).	Dispute between municipality and rural water district regarding whether municipality could annex property within the water district's service area

The absence of a single case supporting Alligator's Section 1926(b) argument is telling: Alligator cannot show likelihood of success on the merits, so the injunction under review was issued in error.

The only case that is germane to the instant matter is *CSL Utilities, Inc. v. Jennings Water, Inc.*, 16 F.3d 130 (7th Cir. 1993). There, the Seventh Circuit thoroughly examined Section 1926(b)'s language and legislative purpose. It held that a purchaser's decision to create its own water supply and to reduce its purchases from a wholesale provider ***does not*** implicate Section 1926(b). As a unanimous panel explained:

> We are aware that the statute [*i.e.* 7 U.S.C. § 1926(b)] is to interpreted broadly, but we think there is no fair implication by which it can be said to reach improvement by a wholesale customer of its own facilities so as to reduce the amount of water it must purchase at wholesale. If Congress had in mind any authorized construction or development which would reduce demand for the rural association's water, it could easily have used language broad enough to reach that broadly defined activity.

Id. at 136.

Alligator attempts to distinguish *CSL Utilities* on two points. First, it argues that the cases are different because CSL Utilities was not a public body, while the Town of McBee is. (Return Br. at 14–15.) But Alligator fails entirely to explain how this distinction could make any difference to the outcome here. There is nothing in *CSL Utilities* or any other of the cases Alligator has cited indicating that a different rule applies to municipal water companies as compared to private water companies. If anything, one would expect that the courts would give more deference to a duly elected municipal body seeking to protect the interests of its citizens than it would give to a private water company pursing private motives. At most, Alligator opaquely hints that the Town of McBee may "expand its territory or impose other burdens" on Alligator. (*Id.* at 15.) But courts do not act based on hypothetical facts or ungrounded fears. The

time for Alligator to object to any such expansions or new burdens would be when they were threatened. No actionable threat of expansion or newly imposed burdens exists here.

Second, Alligator attempts to dismiss *CSL Utilities* because "it does not appear that there was any formal contractual agreement between Jennings Water and CSL Utilities," while there is a water purchase agreement here between the Town and Alligator. (*Id.*) In Alligator's view, the absence of a long-term contract in *CSL Utilities* means that Jennings Water's revenue from CSL Utilities was not a "critical part of the loan arrangement" between Jennings Water and the federal government. (*Id.*)

This is not true. The Seventh Circuit's opinion in *CSL Utilities* was the culmination of multiple federal lawsuits and accompanying appeals. That litigation began only when the federal government sounded an alarm that losing CSL Utilities as a wholesale customer—in fact, its largest wholesale customer—could imperil Jennings Water's ability to repay its debt. *See Jennings Water, Inc. v. City of N. Vernon*, 895 F.2d 311, 313 (7th Cir. 1989) (explaining that Jennings Water filed suit within three weeks after federal officials advised Jennings "to determine whether the impending loss of CSL as a wholesale customer would significantly affects its revenue"). Moreover, also contrary to Alligator's arguments, the federal government was acutely aware of the importance of CSL Utilities as a wholesale customer when loaning money to Jennings Water. *See id.* (outlining the government's attempts to engage CSL Utilities in the loan process with Jennings Water).

Here, the potential injury to the federal loan program is far less than in *CSL Utilities*. In this case, the Town of McBee represents less than 3% of Alligator's annual revenue. (R. pp. 196-97; Campolong Aff. ¶ 33.)

Accordingly, there is no basis to distinguish *CSL Utilities* from the present case. *CSL Utilities* stands for the proposition that that a wholesale customer does not lose the right to use its own water supply even where a federal loan was clearly made in reliance on that customer's revenue stream being available to repay the federal debt. *CSL Utilities* should control the outcome here.

This would be a very different case if a third party were seeking to supplant Alligator as wholesale supplier to the Town of McBee while Alligator's USDA loan is outstanding, but it is not such a case. Nor is it a case where McBee is seeking to use annexation, franchise powers, or condemnation powers to interfere with Alligator's service to existing customers.

Instead, the Town of McBee has simply chosen to place its own wells back into operation—wells that have been permitted by DHEC after a five-year review process without any objection from Alligator. These are the same wells which the Town used before it contracted with Alligator, and are the same wells that supplied the majority of the Town's water supply needs during the first 10 years (1999–2009) when Alligator operated the Town's system. (R. p. 194; Campolong Aff. ¶ 14.) Using these wells to serve the Town's own needs is indisputably permissible under Section 1926(b). As the Seventh Circuit concluded when assessing this exact situation:

> If we were to construe the statute as broadly as Jennings [or, here, Alligator] demands, we would be precluding any development by water utilities of their own water resources as long as a government loan were outstanding to their wholesale supplier. Such an onerous restriction could freeze any self-development for many decades. Jennings' interpretation seems to us to be an extraordinary restrictive and anticompetitive reading—one that simply cannot find support in the language of the statute. No doubt the statute is intended to be broadly protectionist, but there are degrees of protectionism which its plain language does not reach.

CSL Utilities, 16 F.3d at 137.

Because the circuit court committed an error of law when enjoining the Town from operating its wells, the Court should reverse or vacate those injunction orders.

B. The parties' water purchase agreement is irrelevant to the analysis under 7 U.S.C. § 1926(b), and it is not an all-requirements contract in any event.

Alligator attempts to bypass the core issue of statutory construction by resorting to arguments about the water purchase agreement between the Town and Alligator. Though that contract has no bearing on the Section 1926(b) issues raised in the pleadings, the circuit court based its injunction on the existence of this purchase agreement and its view that the contract required the Town to purchase all of its water from Alligator. (R. p. 12; Order Denying Plaintiff's Motion to Alter or Amend at 4.)

Alligator's contention that the water purchase agreement is an all-requirements contract is based exclusively on the fact that the contract contains the word "required." (Return Br. at 16–17.) But, the mere presence of the word "required" in an agreement does not make that agreement an exclusive, full requirements contract as Alligator asserts. Multiple courts agree that "[t]he use of the word 'requirements' in the Quantity of Material provision does not mean that the agreement was a requirements contract." *BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co.*, 804 F.3d 1229, 1232 n.1 (7th Cir. 2015) (applying Indiana law); *see also Agfa–Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1521 (7th Cir.1989) (holding that the parties' contract "looks like the opposite of a requirements contract, despite the presence of the word 'requirements'") (applying New York law); *Propane Industrial, Inc. v. Gen. Motors Corp.*, 429 F. Supp. 214, 219–20 (W.D. Mo. 1977) ("A promise to purchase exclusively from plaintiff cannot be implied solely from use of the terms 'requirement' and "as required" because 'requirement' can mean either 'all needed by defendant for the Fairfax plant' or only 'all desired by defendant from plaintiff.' '[The] word "requirements" . . . is not a word of art' having the meaning attributed to it

by the defendant." (quoting *William C. Atwater & Co. v. Terminal Coal Corp.*, 115 F.2d 887, 888 (1st Cir. 1940))) (internal brackets and ellipsis supplied by the *Propane Industrial* court) (applying Kansas law).

Second, exclusivity is the touchstone of an all-requirements contract, and there is no exclusivity provision in the parties' contract that obligates the Town to acquire its water solely from Alligator or to buy all of its water from Alligator. (R. pp. 42–45; Water Purchase Agreement *passim*.) In fact, the chief case relied on by Alligator emphasizes this exact point and held that a contract's repeated use of the word "all" with respect to how much of a quantity the purchaser would buy from the seller "establishes an exclusive relationship between the parties as to" the goods in question. *Stevens Aviation, Inc. v. DynCorp Int'l, LLC*, 407 S.C. 407, 418, 756 S.E.2d 148, 153 (2014).[1] Because there is no such exclusivity provision here—indeed, Alligator has not identified one—this contract cannot be considered an all-requirements contract.

In sum, Alligator's entire argument regarding the water purchase agreement amounts to nothing more than an anticipatory breach of contract claim, and a futile one at that. It certainly has no bearing on the Section 1926(b) issue, which is dispositive here. Because the water

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[1] Alligator also cites to South Carolina Code § 36-2-306 in support of its position that the presence of the term "requirements" automatically renders a contract to be an all-requirements contract. This citation is misleading. For one, there is no South Carolina case indicating that Article 2 of the Commercial Code applies to providing a water service. *See, e.g., Mattoon v. City of Pittsfield*, 775 N.E.2d 770, 784 (Mass. App. Ct. 2002) (holding that the provision of water amounted to "the rendition of services and not the sale of goods" and, accordingly, that Article 2 of the Commercial Code did not apply). Moreover, even contracts that are governed by the Commercial Code require the same "exclusivity" element in order to be considered all-requirements contracts. *See, e.g., Brooklyn Bagel Boys v. Earthgrains Refrigerated Dough Prods.*, 212 F.3d 373, 379–80 (7th Cir. 2000) (rejecting an argument that Commercial Code § 2-306 converted a contract to an all-requirements contract because "[i]n the absence of exclusivity, there can be no valid requirements contract") (applying Illinois law). Because there is nothing in the water purchase agreement that even suggests the Town will acquire its water exclusively from Alligator, the Court should not credit Alligator's reliance on the Commercial Code.

purchase agreement cannot form the basis of an injunction that prohibits the Town of McBee from turning on its wells, the Court should reverse the circuit court's rulings accordingly.

C. There is no *per se* rule authorizing preliminary injunctions when a party invokes 7 U.S.C. § 1926(b).

In its brief, Alligator does not argue that irreparable harm has been shown here or that Alligator would not have an adequate remedy at law by way of monetary damages if it somehow succeeded on the merits of this case. *See, e.g., Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 122, 603 S.E.2d 905, 908 (2004) (reversing a circuit court's preliminary injunction because the law provided a mechanism for the plaintiff to recover the damages it sought). Alligator has largely conceded those points. Instead Alligator suggests that there is virtually a *per se* rule favoring preliminary injunctions when a water association claims a violation of 7 U.S.C. § 1926(b). (Return Br. at 18.) But there is no such rule.

Quite the contrary, courts have previously reversed preliminary injunctions in the Section 1926(b) context when—just as the Town argues here—a claimed injury can be remedied by a damages award. *See, e.g., Bluefield Water Ass'n, Inc. v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009) (reversing a preliminary injunction because "any harm is financial, and monetary compensation will make Bluefield whole if Bluefield prevails on the merits" of its claim under 7 U.S.C. § 1926(b)).

In this case, revenues from the Town make up only 3% of Alligator's annual revenue. (R. pp. 196-97; Campolong Aff. ¶ 33.) Given that the Town makes up a small portion of Alligator's revenues, there is no legitimate argument that Alligator will be financially ruined in the absence of a preliminary injunction. *See Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010) (reiterating that because injunctions are equitable in nature, "an appellate court may

review the record and make findings of fact in accordance with its own view of the preponderance of the evidence"). The injunction should be reversed for this additional reason.

II. Alligator—a private, nonprofit company—is not the State of South Carolina, and the circuit court erred when exempting it from Rule 65's unambiguous bond requirements.

In its prior brief, the Town showed that Rule 65(c)'s plain language and a uniform body of case law strictly require litigants to post a bond in order to secure a preliminary injunction. Alligator does not submit any case law in response. Instead, Alligator relies only on a legislative Note to Title 33, Chapter 36, of the South Carolina Code to justify the circuit court's failure to require a bond here. (Return Br. at 19–21.) But the plain language of the Note on which Alligator relies contradicts Alligator's assertions.

The General Assembly specified only four instances in which corporations like Alligator may be treated like a special purpose district. They are "for purposes of Chapter 78 of Title 15 [the Tort Claims Act], Chapter 56 of Title 12 [the Setoff Debt Collection Act], Sections 56-3-780 [license plates] and 58-31-30(23) [provision of water services by the Public Service Authority] of the 1976 Code." S.C. General Assembly Act 404, § 1(B) (2000) (reprinted as Editor's Note in preface to Chapter 36 of Title 33). Exemption from the Rule 65(c)'s bond requirement is not one of them.

Under long settled principles of statutory construction, when the Legislature specifically identifies certain ways a law is to be applied, it necessarily exempts all others from the law's scope. *See Rainey v. Haley*, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting *Hodges v. Rainey*, 341 S.C. 79, 553 S.E.2d 578 (2000))).

If the General Assembly had intended to exempt Alligator from Rule 65(c)'s bond requirements, it certainly could have done so. It did not.

Nor would it have been logical to do so. The State of South Carolina need not post a bond to secure a preliminary injunction because it poses no risk of becoming insolvent and unable to make an adverse party whole if an injunction is issued in error. Not-for-profit companies, on the other hand, are not public bodies; they have no taxation power or other means to guarantee an ability to make an adverse party whole. Alligator is a telling example of this financial instability, as mismanagement has caused it to post millions of dollars in losses over the last decade. (R. pp. 195–96; Campolong Aff. ¶ 26; R. pp. 207–41; Accounting Report from Sheheen, Hancock & Godwin, LLP.) As of the date of that report, Alligator's net assets were negative.

Furthermore, basing an exemption from Rule 65(c) on the Note to Title 33, Chapter 36, of the South Carolina Code is a non-sequitur. The Note states that rural water associations shall be treated as "special purpose districts" for certain specified purposes. Special purpose districts are a form of limited-purpose municipal corporations exercising powers that are now devolved by the South Carolina Constitution on counties. *Knight v. Salisbury*, 262 S.C. 565, 573, 206 S.E.2d 875, 878 (1974). Rule 65(c), however, exempts from the bond requirement only "the State or an officer or agency thereof." Special purpose districts are not the State or a state agency. Even if rural water associations were considered to be special purpose districts for purposes of Rule 65(c), they would still have to post a bond where they seek an injunction.

Accordingly, the circuit court committed reversible error in issuing a preliminary injunction without requiring Alligator to post a bond. *See, e.g.*, *Spartanburg Buddhist Ctr. of S.C. v. Ork*, ___ S.C. ___, 790 S.E.2d 430, 435 (Ct. App. 2016) ("[O]ur appellate courts have

interpreted Rule 65(c) strictly. Therefore, it was error for the circuit court to issue the second injunction without satisfying the requirements of Rule 65(c).") (internal citation omitted).

CONCLUSION

The Town of McBee has invested considerable time and resources refurbishing its wells and securing the appropriate state permits to operate those wells and furnish its own water. The Town's decision to reduce its reliance on Alligator in favor of furnishing its own water to the Town's customers is entirely consistent with 7 U.S.C. § 1926(b), and neither the circuit court nor Alligator has identified anything to the contrary. Accordingly, the Court should reverse the circuit court's injunction orders.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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